

ERIC A. SEITZ
ATTORNEY AT LAW
A LAW CORPORATION

ERIC A. SEITZ 1412
LAWRENCE I. KAWASAKI 5820
RONALD N.W. KIM 8306
820 Mililani Street, Suite 714
Honolulu, Hawaii 96813
Telephone: (808) 533-7434
Facsimile: (808) 545-3608

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

WENDELL TANGARO,)	CIVIL NO. 03-00211 JMS/LEK
)	
Plaintiff,)	PLAINTIFF'S PRETRIAL
)	STATEMENT; CERTIFICATE
vs.)	OF SERVICE
)	
JOSEPH BOTELHO, COUNTY OF)	Final Pretrial Conference:
HAWAI'I, AND JOHN DOES 1-10,)	Date: August 24, 2006
)	Time: 9:00 a.m.
Defendants.)	Judge: Magistrate Kobayashi
)	
_____)	Trial: October 3, 2006

PLAINTIFF'S PRETRIAL STATEMENT

Pursuant to the Rules of the United States District Court for the District of Hawaii, LR 16.6, inter alia, Plaintiff hereby submits the following Pretrial Statement.

JURISDICTION AND VENUE

The Court has jurisdiction over this civil rights action pursuant to 42 U.S.C. Section 1983 and 28 U.S.C. Sections 1331 and 1343. Venue is proper pursuant to 28 U.S.C. Section 1391(b) because all relevant acts and/or omissions occurred in, and all parties reside within, the State of Hawaii.

SUBSTANCE OF THE ACTION

In the early morning of April 17, 2002, Plaintiff Wendell Tangaro (hereinafter "Plaintiff") was sleeping in the back seat of a friend's automobile parked on Shipman Street in Hilo, Hawaii. Plaintiff was awakened suddenly when his friend opened the back door of the vehicle to warn him that the police were coming. Plaintiff was on parole at the time and became afraid that he might be arrested, so he jumped into the front seat of the vehicle intending to flee the scene. Plaintiff got into the front seat as Defendant Hawaii County Police Officer Joseph Botelho (hereinafter "Defendant Botelho") approached and stood on the sidewalk in front of the vehicle. As he was looking to the rear and reversing the car away from Defendant Botelho, Defendant Botelho drew his gun, and without any warning or provocation fired at Plaintiff striking him in the left side of his neck.

UNDISPUTED FACTS

- (1) The residence and status of all parties is undisputed.

(2) It is undisputed that Plaintiff was sleeping in the back seat of a motor vehicle parked on Shipman Street in Hilo, Hawaii in the early morning of April 17, 2002.

(3) It is undisputed that after Hawaii County Police Officers arrived at the scene Plaintiff was awakened, jumped into the driver's seat of the vehicle and attempted to flee.

(4) It is undisputed that as Plaintiff was trying to flee Defendant Botelho shot Plaintiff in the left side of his neck.

DISPUTED FACTUAL ISSUES

Whether the manner in which Plaintiff attempted to flee posed any immediate and significant threat of serious physical harm to Defendant Botelho or others justifying the use of deadly force.

RELIEF SOUGHT

Plaintiff seeks general, special, and punitive damages.

PLAINTIFF'S THEORIES OF LIABILITY

(1) Acting and/or purporting to act herein under color of statutes, ordinances, rules, regulations, customs, policies, practices, and/or usages of the State of Hawaii, Hawai'i County Police Officer Joseph Botelho violated rights guaranteed to Wendell Tangaro by the Fourth, Fifth, Sixth, Eighth, and Fourteenth

Amendments to the United States and comparable provisions of the Constitution of the State of Hawaii, inter alia.

(2) Defendant Botelho acted herein knowingly, deliberately, intentionally, and maliciously without regard for the rights, interests, and well-being of Wendell Tangaro.

POINTS OF LAW

The Fourth Amendment prohibits the use of deadly force by a police officer except where the officer has a reasonable belief that the suspect poses an immediate and significant threat of serious physical harm to the officer or others and/or is actively resisting arrest or attempting to evade arrest by flight, and his escape will result in serious injuries to persons. Graham v. Connor, 490 U.S. 386, 104 LEd2d 443, 109 S.Ct. 1865 (1989); Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985); Harris v. Roderick, 126 F.3d 1189 (9th Cir. 1997); Curnow v. Ridgecrest Police, 952 F.2d 321 (9th cir. 1991).

LAY WITNESSES

In addition to rebuttal witnesses, witnesses identified through subsequent discovery, and the witnesses listed in Defendants' Responsive Pretrial Statement and any amendments thereto, Plaintiff intends to call:

- (1) Wendell Tangaro
c/o Eric A. Seitz, Esq.
820 Mililani Street
Suite 714

Honolulu, Hawaii 96813

- (2) Justin Aoki
c/o Kulani Correctional Facility
HC 01 Stainback Highway
Hilo, Hawaii 96720
- (3) Roger Starbuck
45 Shipman Street
Hilo, Hawaii 96720
- (4) Joseph Botelho
c/o Harry P. Freitas, Esq.
Hilo Lagoon Centre
101 Aupuni Street, Suite 325
Hilo, Hawai'i 96720
- (5) Jason Grouns
c/o Harry P. Freitas, Esq.
Hilo Lagoon Centre
101 Aupuni Street, Suite 325
Hilo, Hawai'i 96720
- (6) Fetuutuunai Amuimuia
c/o Harry P. Freitas, Esq.
Hilo Lagoon Centre
101 Aupuni Street, Suite 325
Hilo, Hawai'i 96720

The above listed witnesses will testify as to the events surrounding the subject incident.

- (7) Custodian of Records
Hawai'i County Police Department
c/o Harry P. Freitas, Esq.
Hilo Lagoon Centre
101 Aupuni Street, Suite 325
Hilo, Hawai'i 96720

The above witness will produce records related to the subject incident and policies of the Honolulu Police Department.

- (8) Custodian of Records
Hilo Medical Center
1190 Waianuenue Avenue
Hilo, Hawai'i 96720

The above witness will produce records related to the treatment Plaintiff received at the Hilo Medical Center after the incident.

EXPERT WITNESSES

- (1) D.P. Van Blaricom
835 - 91st Lane, N.E.
Bellevue, Washington 98004-4811

Mr. Van Blaricom will testify as to the justification and reasonableness of the use of force and related police practices.

- (2) Timothy Oldfather, M.D.
Hilo Medical Center
1190 Waianuenue Avenue
Hilo, Hawai'i 96720

Dr. Oldfather will testify as to the diagnosis and treatment of Plaintiff's injuries after the incident.

MOTIONS

In a decision filed August 5, 2004 the court granted summary judgment in favor of Defendant County of Hawaii and denied summary judgment in favor of Defendant Botelho. On February 13, 2006 the court denied Defendant

Botelho's Motion for Reconsideration the denial of his motion for summary judgment. Plaintiff's Motion to Extend Deadline for Motion to Join Additional Parties, and for Leave to File First Amended Complaint filed July 24, 2006 is currently pending.

EXHIBITS, SCHEDULES AND SUMMARIES

Plaintiff will introduce medical records, reports of examinations of physical evidence, transcripts, police records and reports, expert reports, deposition testimony, medical bills as they relate to the subject incident.

FURTHER DISCOVERY AND/OR MOTIONS

Discovery has been completed.

STIPULATIONS

Plaintiff will seek Defendant's stipulation to the authenticity of all items of evidence to be presented at trial.

SETTLEMENT DISCUSSIONS

Prior and ongoing settlement discussions have not resulted in a settlement agreement.

AGREED STATEMENT

Not applicable.

BIFURCATION, SEPARATE TRIAL OF ISSUE(S)

Not requested.

REFERENCE TO A MASTER OR MAGISTRATE JUDGE

The parties have not agreed to have United States Magistrate Judge conduct all or part of the proceedings in this case.

APPOINTMENT AND LIMITATION OF EXPERTS

Not applicable.

TRIAL

Jury selection and trial is scheduled to commence on October 3, 2006.

ESTIMATE OF TRIAL TIME

The jury trial is estimated to last six (6) trial days, including voir dire and deliberations.

CLAIMS OF PRIVILEGE OR WORK PRODUCT

The personnel records of Defendant Botelho are the subject of a stipulated protective order filed herein on January 8, 2004.

DATED: Honolulu, Hawai'i, August 15, 2006.

/s/ Eric A. Seitz

ERIC A. SEITZ
LAWRENCE I. KAWASAKI
RONALD N.W. KIM

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing was served electronically via CM/ECF to the following at their last known address:

HARRY P. FREITAS, ESQ.
BRANDON A.K. GONZALES, ESQ.
Deputies Corporation Counsel
County of Hawaii
101 Aupuni Street, Suite 325
Hilo, Hawaii 96720
E-mail: hfreitas@co.hawaii.hi.us

DATED: Honolulu, Hawaii, August 15, 2006

/s/ Eric A. Seitz
ERIC A. SEITZ
LAWRENCE I. KAWASAKI
RONALD N.W. KIM

Attorneys for Plaintiff